FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 640

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Petitioner,

against

ROBERT B. ANDERSON, Secretary of the Treasury, *et al.*,

Respondents.

PETITION FOR RECONSIDERATION OF A DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Lena S. Tillman, administratrix of the estate of James A. Tillman, deceased, respectfully requests reconsideration of the denial by this Honorable Court of her petition for a writ of certiorari entered in the above-entitled case on February 29, 1960.

Grounds Urged

The Solicitor-General informed this Court that the petitioner seeks to review the decision of the Foreign Claims Settlement Commission in her case. The petitioner has

no such purpose, because the Commission has completed its task, has no further authority to deal with the petitioner's claim and has no funds to pay her.

The reason why the Commission is made a party to this action is that it is the sole agency for enforcing Section 305 of the Foreign Claims Settlement Act of 1955 (22 U. S. C., 1641 (m) et seq.), and said section is the only basis for Government's taking of petitioner's vested property liens.

The Solicitor-General informed the Court (her brief at p. 9) that the petitioner's property was taken by order of the Federal Court in *Steingut* v. *Guaranty Trust Co.*, 58 Fed. Supp. 623. We have demonstrated in petitioner's reply brief (at p. 3) that in that action the Court did not order taking of any property by anyone, but merely denied the delivery of the property in question to Steingut as New York receiver of Russo-Asiatic Bank.

The possession of the property subject to petitioner's lien was ordered to be delivered by the Federal Court in *U. S.* v. *The Guaranty Trust Co.*, 58 F. Supp. 623, to which action the petitioner's husband was not a party. Consequently, the action did not constitute either direct or a collateral estoppel against this petitioner.

Unless the Government contends that Mr. Litvinov acting for the Soviet Union, could transfer title to the Government on vested property liens of an American citizen with regard to the property in New York, the Government has no other source of title except Section 305 of the Foreign Claims Settlement Act of 1955.

Throughout its brief, the Solicitor-General cited various appeals, decided prior to 1935 (his brief at p. 6) in the litigation between Tillman and Russo-Asiatic Bank. The Solicitor-General did not inform the Court that subsequent to these decisions, the Court of Appeals of New York held in *Issaia* v. *Russo-Asiatic Bank*, 266 N. Y. 36, that the

lawyers who appeared for the *Russo-Asiatic* bank in these cases were without authority to represent it and that legal steps taken by them were a nullity (J. A. at pp. 4, 5). Consequently, the decisions cited by the Attorney-General a the end of page 6 had become null and void, and without any legal significance.

Equally unfounded was the claim of the Solicitor-General that in *Steingut* v. *The Guaranty Trust Corp.*, 58 F. Supp. 623, Judge Rifkind held that Tillman had no attachment in effect on November 16, 1933. The question of the validity of Tillman's detachment was not involved in any manner, because Steingut, as receiver did not claim any title to the property of Russo-Asiatic, but merely possession for the purpose of administering it for the benefit of creditors of said bank including Tillman. In explaining receivers' position in the case, Judge Rifkind in *U. S.* v. *National City Bank*, 90 F. Supp. 448 said at page 450:

> "The Receivers are state created stakeholders who seek *possession*."

In making this claim, the Solicitor-General failed to state that on appeal from Judge Rifkind's decision to the U. S. Circuit Court of Appeals, Guaranty Trust Co. argued that the Government's recovery against it should be reduced by the amount of valid attachments including that of Tillman. The Government answered that no question of attachments could be raised, because no such question was pleaded or tried in the District Court, and furthermore, that the Government merely sought possession "in order to create a pool out of which American creditors against these funds might satisfy their claims." (Compare: *U. S.* v. *National City Bank*, 90 F. Supp. 448, at p. 453.)

In seeking all the Soviet funds under the Roosevelt-Litvinov agreement, the Government expressly sought mere possession for the benefit of American creditors, and not an adverse title.

The Government in moving to dismiss this complaint for lack of jurisdiction admitted all questions of fact alleged in the complaint including that "said James A. Tillman obtained a valid lien thereupon in the amount of $210,675.05" and "that the United States took over said deposits burdened with aforesaid lien to said James A. Tillman." (J. A. p. 13). The choice here is between the Solicitor-General's reliance on a dictum in *Steingut* v. *the Guaranty Trust Co.* (his brief at p. 7) and the holding of New York Supreme Court in 1953 in *Smith* v. *Russo-Asiatic Bank,* in which Steingut, as receiver, was represented by the same attorneys who appeared and participated in the trial of *Steingut* v. *Guaranty Trust Co.* In *Smith* case it was held under Section 977-b of the New York Civil Practice Act that Tillman had, in 1953, i.e., five years after the decision in *Steingut* v. *The Guaranty Trust Company* "*valid* attachment issued out of any Court in this State" and paid on said attachment to petitioner herein $10,000.00, the proportionate amount due out of the funds of the Russo-Asiatic Bank held by the receivers. Since there were junior attaching creditors interested in the fund, if Tillman did not have a valid lien, they would have received this $10,000.00 instead of the petitioner (J. A. at p. 8). In New York all attached funds constitute one fund from which attaching creditors are paid in order of their attachment writs.

The principal grounds on which the Supreme Court of New York held in 1953 that petitioner had a valid attachment lien on the funds of Russo-Asiatic Bank in New York are set forth in the Joint Appendix at pages 45-48.

We may add that even apart from New York law as to attachments, the dictum of Judge Rifkind was based on an entry of an order in the U. S. District Court by counsel for Russo-Asiatic Bank who had no authority to represent the Bank and the District Court was without jurisdiction as the case was thereafter remanded to the State Court for that reason by the Circuit Court of Appeals.

The Solicitor-General disparagingly referred to the form of petitioner's judgment as being one by default of the defendant. Before the remand of the Tillman case to the State Court, there were two jury trials in the District Court for the Eastern District of New York, both of which resulted in verdicts in favor of Tillman. The last of such trials gave Tillman a verdict of $172,566.60, and the Court denied motion for a new trial, but thereafter by order of the Circuit Court of Appeals was directed to set the proceedings in the District Court aside and remand the case to the State Court (J. A. at p. 4).

Petitioner's final unappealable judgment of the Supreme Court of New York, even if obtained by default is entitled to full constitutional protection (*Morris* v. *Jones*, 329 U. S. 545; *Treinies* v. *Sunshine Mining Corp.*, 308 U. S. 66; *Riehli* v. *Margolies*, 279 U. S. 218.)

The Solicitor-General also cited Section 305 (7-e) of the International Claims Settlement Act of 1949 (64 stat. 12) to the effect that any person filing claim under the Act "consented to all provisions".

The petitioner was compelled to file her claim with the Commission under the well-known rule that before anyone may invoke judicial intervention, he must exhaust his administrative remedies. It is settled law that mere participation in proceedings under such an Act is not a waiver. There must be acquiescence (*Ohio Bell Telephone Corp.* v. *Public Utilities Commission of Ohio*, 301 U. S. 302). Here, the petitioner, in all her proceedings before the Foreign Claims Settlement Commission expressly relied on her constitutional rights and claimed that both the provisions of Section 305 of the Foreign Claims Settlement Act of 1955 and the acts of the Commission thereunder with regard to the petitioner's property were violations of the Federal Constitution. Besides, where a party filing under a statute providing for automatic consent receives no benefit under it and disputes its application to the

claims, there is no consent (*Buck* v. *Kuykendall, Director of Public Works of the State of Washington*, 267 U. S. 307, 317; *Arizona* v. *Copper Queen Mining Corp.*, 233 U. S. 87, 94.)

Petitioner's property was taken without ever affording her an opportunity to defend it in Court on the merits. The only justification for such a result offered by the Solicitor-General is *Steingut* v. *Guaranty Trust Co.*, 58 Fed. Supp. 623 (his brief at p. 9), the case in which United States was not a party and in which judgment did not dispose of any property.

The Government moved in the District Court to dismiss the case for lack of jurisdiction (J. A. 49). It then moved in the Court of Appeals to dismiss petitioner's appeal for "lack of meritorious issue" (Pet. App. 29). The Court of Appeals did not decide the question of jurisdiction of the District Court but summarily affirmed the dismissal citing cases seeking to review on the merits the decisions for the Foreign Claim Settlement Commission on other than the constitutional grounds, with the exception of *First National City Bank* v. *Gillilland et als.*, 257 F. 2d 233, in which an attachment lien belonging originally to the British subject was involved and although constitutional questions were raised, they were not open to the plaintiff because neither the Roosevelt-Litvinov agreement nor the Foreign Claims Settlement Act of 1955 covered British subects.

While Congress may change contractual rights, it has no power to abrogate vested property liens (*In Re Lowman*, 79 Fed. (2d) 887, 890).

In *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, the plaintiff was deprived of property by the State of Missouri by shrewd summary applications in the State Court without being afforded a trial on the merits. In reversing the

judgment of the Missouri Court, this Court said at page 678:

> "This court granted certiorari, 280 U. S. 550. We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right.
>
> *First:* It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense."

In *Louisville Joint Stock Land Bank* v. *Rockford*, 295 U. S. 555, 601, this Court expressly held that the Congress has no power to take property from one creditor and transfer it to another creditor without compensation. This is precisely what Section 305 of the Foreign Claims Settlement Act of 1955 accomplished in this case: (Pet. App., p. 25). The Solicitor-General conceded, as he was obliged to do by decisions of this Court, that the Foreign Claims Settlement Division had to give full faith and credit to the judgment of the New York Supreme Court (Compare: *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 113), and yet contended that the Commission could reduce the amount of petitioner's attachment lien fixed by the judgment of New York Supreme Court on the ground that Congress imposed a duty upon the Commission to allow only so much of such lien fixed by said judgment as was based on underlying claims originally owned only by American citizens.

The Solicitor-General frankly concedes that the purpose of this provision was to cut down the amount of the claims (his brief at p. 6, Note 2). In other words, the claim is that by introducing a new or additional issue not considered by the Court in arriving at a judgment, the judg-

ment itself may be altered, amended or revised by an agency at the Executive Department of the Government.

In *Lakelands v. Chippewa and Flambeau Improvement Co.*, 295 N. W. 919, 237 Wis. 326, the Supreme Court of Wisconsin adjudged the amount of land covered by a Federal grant registered in the U. S. Land Office. Thereafter, the defeated party asked the Land Office to resurvey the land subject to the grant. On such resurvey the U. S. Land Office eliminated about twenty (20) acres. The Court held that the resurvey was a nullity insofar as it sought to change the amount of land awarded by the judgment of the Missouri Court on the ground that its judgment could not be interfered with in any manner by any agency of the Executive Government, whether Federal or State.

In *Pacific Greyhound Mines v. Brooks*, 70 Ariz. 339, 220 P. (2), 477-479, an Arizona Court by a judgment fixed the route of a bus company. The decision was based on three permits of the State Highway Commission. There after one of the parties to the judgment attempted to run a bus on a route forbidden to it on the ground that it held another permit which was not produced in the action. The Supreme Court of Arizona held that this additional permit of the State Highway Commission could have no effect in altering or revising the judgment of the Court, because it constituted an unconstitutional interference with the judicial power by an Executive Agency.

On the same principle the attempt of Congress (if it so intended) and of the Commission to modify the amount of petitioner's liens as fixed by the judgment of the New York Supreme Court was an attempt to exercise a power denied by the Constitution to the Executive Branch of the Government with regard to the final judgments of the Judicial Branch.

Petitioner appealed from the dismissal of her complaint by the District Court on the ground that the District Court

had jurisdiction to consider petitioner's claim for compensation on account of confiscation by the Government of her vested liens (*Ginsberg* v. *Leidal*, 107 F. 2d 721), and on the ground that the full Faith and Credit clause in the Fifth Amendment and the provisions for a separation of governmental powers were violated in an attempt to vary the amount of petitioner's lien as fixed by the final judgment of the New York Supreme Court by means of an alleged right to investigate the national origin of the owners of some of the property rights assigned to Tillman. Instead of deciding whether the District Court had jurisdiction over the complaint alleging such constitutional violations, the Court of Appeals affirmed on motion, upon the apparent ground that there is no power to review on the merits violations of constitutional guarantees by the Foreign Claims Settlement Commission.

In *Cole* v. *Arkansas*, 333 U.S. 196, a person was convicted under Section 2 of an Arkansas statute. On appeal, the Supreme Court of Arkansas held the person guilty of Section 1 of the statute. In reversing this Court said, at page 201:

> "Futhermore, once Arkansas provides for an appeal to the State Supreme Court * * * the proceedings in that Court are a part of the process of law under which the petitioners' convictions must stand or fall. * * *
>
> "The convictions were for a violation of Section 2. Petitioners urged in the State Supreme Court that the evidence was insufficient to support their convictions of a violation of Sec. 2. They also raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution: *None of these contentions were passed upon by the State Supreme Court.* It affirmed their convictions as though they have been tried and convicted of a violation of Sec. 1. * * *

"To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and the issues were determined in the Trial Court."

The right to an appeal and to a plenary hearing on the merits is an integral part of the Federal judicial system. The Solicitor-General refers to Rule 31-J of the Rules in the Court of Appeals which states that motions do not require oral argument. The Petitioner's claim is not with regard to the motions but with regard to the plenary appeal to which Rule 31 has no application and where Rule 19 (a) secures oral argument. Petitioner submits that if she had an oral argument in the Court of Appeals in this case, the Court would not have erred in understanding the true issues on the petitioner's appeal before it.

However, irrespective of the Rules of the District Court of Appeals, the Judicial Code in U. S. C. 28, Chapter 3, Section 46-C specifically requires that the Federal Court of Appeals shall *"hear"* the appeals before it.

In *Ochoa* v. *Hernandez*, 230 U. S. 139, this Court said, at page 141:

"Due process 'inhibits the taxing of one man's property and giving it to another, *contrary to settled usages and modes of procedure*, and without notice or an opportunity for a hearing'."

In *Dowd* v. *U. S.*, 340 U. S. 206, where the Court denied the hearing of appeal on the merits and disposed of it on a motion, this Court, in reversing, said:

"But we find no indication that such appeals will ever be heard *as of right* • • • nothing short of an actual appellate determination of *the merits* of the conviction—*according to the procedure prevailing in*

ordinary cases—would cure the original denial of equal protection of law."

In *Griffin* v. *Illinois*, 351 U. S. 12, this Court said, at pages 18 and 20:

> "Appellate review has now become an integral part of the Illinois trial system * * *. Consequently at all stages of the proceedings the due process and Equal Protection Clauses protect persons like petitioners from insidious discriminations. * * *
>
> * * * The right to an appeal * * * is fundamental to the protection of life and liberty and therefore a necessary ingredient in due process of law. * * *"

In holding that it has the power to dismiss a plenary appeal on the merits without argument and without the reply brief of the appellant, the Court of Appeals failed to follow the decision of this Court in *Sparrow* v. *Strong*, 70 U. S. 49-50 in which it held that the motions to dismiss are limited to the lack of jurisdiction and the regularity of the appeal, and a further decision of this Court in *Amory* v. *Amory*, 91 U. S. 356, where it held that the merits of an appeal could not be disposed of by a motion to dismiss.

The decision of the Court of Appeals in this case was in direct conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Seeman* v. *U. S.*, 40 Fed. 2d 88 and for the Third in *U. S.* v. *Nudelman*, 207 F. (2d) 109. On this branch of the petitioner's application, she has brought herself squarely within Rule 19 of this Court which provides that a writ of certiorari should be granted.

> "Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; * * * or has decided a Federal question in a way in conflict with applicable de-

> cisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings. * * *"

The vested liens of your petitioner in the funds of the Russo-Asiatic Bank were the only asset left by her husband to her and to her children. The courts below denied to your petitioner the consideration on the merits of her right to said liens for alleged lack of jurisdiction. Due process requires that property rights be adjudicated on the merits. Appeals cannot be disposed of on the merits without an argument and a reply brief prescribed by statute and by settled due course of judicial appellate proceedings.

Least of all private property cannot be confiscated without compensation and for distribution to other citizens selected by the Government. Your petitioner appreciates that this Honorable Court has nationally important questions before it for its decision. Yet it is also the proper guardian of the constitutional guarantees of the personal and property rights of a rank citizen. Recently, Professor Charles L. Black of Yale University discussed judicial review by this Honorable Court in a democracy in his book just published "The People and the Court", and, thus stated his conclusions as to said guarantees:

> "They inscribe our highest political ideas. What they mean is what we as people mean. If we construe them liberally and creatively, employing the skills of legal reasoning to give them body and life, bringing the resources of legal technique to bear to make them apply to new problems as well as to old, then we have a right to make speeches about our sacred generalities without deserving a ripe tomato in the face from the gallery of history.
>
> If we construe them away, laughing behind our sleeves at the 'perfectly legal' legerdemain with which the

trick has been managed, we construe away the dignity and worth of our nation."

WHEREFORE, your petitioner respectfully prays that her petition for reconsideration be granted and that upon such reconsideration a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

LENA S. TILLMAN,
Petitioner.

Respectfully submitted,

JOHN WATTAWA
and
BORRIS M. KOMAR,
Counsel for Petitioner.

Verification

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LENA S. TILLMAN, being duly sworn, deposes and says: That she is the above named petitioner. That she has read the foregoing petition and that the statements therein are true to her own knowledge.

LENA S. TILLMAN.

Sworn to before me this
21st day of March, 1960.

WILLIAM H. LEFKOWITZ,
Notary Public,
State of New York.
Qualified in New York County.
#31-7475-200.
Comm. expires March 30, 1961.

(NOTARIAL SEAL)

Certificate of Counsel

WE, the counsel for the above petitioner hereby certify that the within Petition for Reconsideration of the denial of petition for writ of certiorari to the petitioner is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58, Subdivision 2 of this Court.

Dated: New York, N. Y., March 21, 1960.

JOHN WATTAWA.

BORRIS M. KOMAR.